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No. 09-

IN THE
Supreme Court of the United States

CENTRA, INC. AND DETROIT INTERNATIONAL BRIDGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held, in conflict with the rulings of other circuits, that a former employer may be assessed withdrawal liability under ERISA for its divested operations when withdrawal occurs years after divestiture in the absence of a finding that a principal purpose of the divestiture was to evade or avoid such withdrawal liability.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were: (1) the Petitioners CenTra, Inc. and Detroit International Bridge Company, and (2) the Respondent Central States, Southeast and Southwest Areas Pension Fund.

RULE 29.6 STATEMENT

Petitioner CenTra, Inc. is a holding company. It has no parent. No publicly held company owns 10% or more of CenTra, Inc.

Petitioner Detroit International Bridge Company is a wholly-owned subsidiary of CenTra, Inc. One hundred percent of Detroit International Bridge Company's stock is owned by CenTra, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

I. The Seventh Circuit's Decision Disrupts the Carefully-Balanced Statutory Scheme 12

II. The Seventh Circuit's Analysis Conflicts with Other Circuit Courts of Appeals 15

A. The Seventh Circuit's Analysis Conflicts with the Sixth Circuit's Holding on the Liability of Predecessor Employers 15

B. The Fifth and Third Circuits Hold that Withdrawal Liability Is Determined Solely as of the Date Withdrawal Occurs 19

III. The Seventh Circuit's Decision Creates Confusion and Uncertainty for Employers 22

CONCLUSION 24

TABLE OF CONTENTS—Continued

Page

Appendix A: Opinion of the United States Court of Appeals for the Seventh Circuit decided August 20, 2009 ....App. 1a-28a

Appendix B: Opinion and Order of the United States District Court dated October 30, 2008 .....App. 29a-42a

Appendix C: Opinion of the Arbitrator dated October 10, 2007 .....App. 43a-116a

Appendix D: Supplemental Decision of the Arbitrator dated February 12, 2008 .....App. 117a-121a

Appendix E: Order of the United States Court of Appeals for the Seventh Circuit Denying Petition For Rehearing dated October 9, 2009 .....App. 122a-123a

TABLE OF AUTHORITIES

Page(s)

CASES

CMSH Co., Inc. v. Carpenters Trust Fund, 963 F.2d 238 (9th Cir. 1992) 17

Connolly v. PBGC, 475 U.S. 211 (1986) 4

Godchaux v. Conveying Techniques, Inc., 846 F.2d 306 (5th Cir. 1988) 19, 20

IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986) 21

Teamsters Pension Trust Fund v. Central Michigan Trucking Line, 698 F. Supp. 698 (W.D. Mich. 1987) 17, 18

Teamsters Pension Trust Fund v. Central Michigan Trucking Line, 857 F.2d 1107 (6th Cir. 1988) ..... *passim*

Teamsters Pension Trust Fund v. Fed. Express Corp., No. Civ. A 86-304, 1995 WL 791371, 1995 U.S. Dist. LEXIS 19980, *aff'd sub nom. Flying Tiger Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 96 F.3d 1432 (3d Cir. 1996) 21

STATUTES

Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461 1

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1301(b)(1) ..... *passim*

29 U.S.C. § 1381(a) ..... *passim*

29 U.S.C. § 1383(a)(2) 6

29 U.S.C. § 1392 8

29 U.S.C. § 1392(c) 8, 14, 18, 23

29 U.S.C. § 1398 ..... *passim*

29 U.S.C. § 1401 7

LEGISLATIVE MATERIALS

H.R. Rep. No. 807, 93rd Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4716 13

S. Rep. No. 383, 93rd Cong., 2d Sess. 43, *reprinted in* 1974 U.S.C.C.A.N 4890, 4928 13

MISCELLANEOUS

Charles G. Cole, *Petitioning for Certiorari in the Big Case*, No. 3 Litig. 33 (Spring 1986) 12

CenTra, Inc. ("CenTra") and Detroit International Bridge Company ("DIBC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 578 F.3d 592 (7th Cir. 2009) and reprinted at App. 1a-28a. The order denying *en banc* review is at App. 122a-123a.

The decision of the district court is reported at 585 F. Supp. 2d 1017. (App. 29a-42a).

JURISDICTION

The court of appeals entered its judgment on August 20, 2009, and denied the petition for rehearing *en banc* on October 9, 2009. (App. 1a, 122a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS INVOLVED

This petition involves sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461. The relevant portion of 29 U.S.C. § 1301(b)(1) provides:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed

> by a single employer and all such trades or businesses as a single employer. * * *

29 U.S.C. § 1301(b)(1) (2009).

Section 1381(a) provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (2009).

Section 1398 provides, in pertinent part:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because –
>
> . . . .
>
> (A) [of] a change in corporate structure described in § 4069(b) . . . if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .
>
> For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398 (2009).

STATEMENT OF THE CASE

This case presents significant issues about the assessment of withdrawal liability in multiemployer pension plans under ERISA. In 1996, CenTra sold its trucking operations through stock sale transactions. At the time of the sales, CenTra's trucking subsidiaries contributed to the Central States, Southeast and Southwest Areas Pension Fund (the respondent, "Central States") on behalf of their employees. Central States was and is an underfunded multiemployer pension plan.

Under the provisions of the 1980 amendments to ERISA (the Multiemployer Pension Plan Amendments or "MPPAA"), employers are required to pay a "withdrawal liability" if they leave underfunded multiemployer pension plans in ways that reduce the plan's contribution base. Withdrawal liability is calculated according to when "the employer" withdraws from the pension plan. 29 U.S.C. § 1381(a). A parent and subsidiary are treated as one employer for this purpose. 29 U.S.C. § 1301(b)(1).

At the same time, MPPAA provides safe harbors for employers who sell businesses (or make other corporate changes) in ways that do not reduce the contribution base. One safe harbor provides that an employer will not be subject to withdrawal liability as a result of the sale of a subsidiary's stock if "the change causes no interruption in employer contributions or obligations in corporate structure under the plan." 29 U.S.C. § 1398. The entity

resulting from such structural change "shall be considered the original employer." *Id.* These safe harbors were designed to "moderate and mitigate" the statute's operation. *Connolly v. PBGC*, 475 U.S. 211, 225-26 & n.8 (1986).

In this case, CenTra structured the sale of its trucking operations in a way that complied with the safe harbor provision while maintaining the contribution base and passed the contribution obligation onto the purchaser who accepted and maintained that obligation until its later withdrawal. Years after the sale of those operations, however, Central States assessed over $13 million in withdrawal liability against CenTra for the divested operations and called into question a basic economic assumption underlying the transaction.

The court of appeals, rejecting the decision of the arbitrator selected by the parties, held that CenTra was subject to withdrawal liability for the divested trucking operations. The court departed from opinions in other circuits by using a non-statutory basis for holding that the liability stayed with CenTra. This departure from the statutory framework upset the legitimate expectations of the parties and undermined the economic premises of the transaction.

1. As the court of appeals observed, "the facts are not materially in dispute." (App. 3a). CenTra is a holding company created in 1970 for two subsidiaries engaged in trucking services. (App. 3a, 48a). CenTra later acquired, indirectly through a

subsidiary, petitioner Detroit International Bridge Company ("DIBC"). (App. 48a).[1] CenTra and all of its subsidiaries are treated as a single employer by virtue of 29 U.S.C. § 1301(b)(1). (App. 3a n.1).

Deregulation of the trucking industry in the 1980s opened up the markets served by CenTra's subsidiaries, and led CenTra to reevaluate whether it should continue in the trucking business. (App. 5a, 32a, 50a, 93a-94a). In 1987, CenTra received from the Internal Revenue Service ("IRS") a favorable ruling on a proposed reorganization of its operations. (App. 50a).[2]

The reorganization occurred in December 1995 as follows. The two trucking subsidiaries (Old Subs) were merged into CenTra and, simultaneously with that merger, their "'operating assets and related liabilities'" were dropped down into new subsidiaries (New Subs). (App. 52a-53a). The New Subs continued contributing to the Central States fund, using the Old Subs' reporting numbers. (App. 54a). In 1996, CenTra sold the stock of the New Subs to a company – U.S. Truck Company ("U.S. Truck") – that ended up outside of the CenTra controlled group. (App. 54a-55a). There was no interruption or

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[1] DIBC owns and operates the Ambassador Bridge, which links Detroit, Michigan with Windsor, Ontario. (App. 49a).

[2] CenTra separately obtained an opinion letter from the Pension Benefit Guaranty Corporation ("PBGC"), the agency charged with implementing and interpreting the statute, that supported CenTra's position on the reorganization and stock sales as outlined herein.

change in employer contributions following the stock sales to U.S. Truck. (App. 54a).

"When the dust settled, CenTra retained only one business unit that still participated in the Fund – the DIBC toll booth operations on the Ambassador Bridge." (App. 55a). In November 1997, DIBC's obligation to contribute to Central States was terminated, thereby triggering CenTra's complete withdrawal. (App. 55a-56a). An employer withdraws completely when it "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a)(2).

In the meantime, U.S. Truck, facing significant continuing operation costs, was unable to negotiate wage and benefit concessions from its employees' bargaining representatives. Furthermore, Central States threatened to expel U.S. Truck from the Fund, thereby triggering significant withdrawal liability. Therefore, on December 23, 1999, U.S. Truck filed for bankruptcy and permanently ceased operations and permanently stopped contributing to Central States on that same day. (App. 34a).

In June 1998, Central States served a notice of withdrawal liability on CenTra in the amount of $14.7 million. (App. 10a). CenTra's withdrawal occurred in November 1997, and Central States calculated CenTra's withdrawal liability based on that date. (App. 16a). Although CenTra had divested the trucking subsidiaries years earlier, Central States included their pre-1996 contribution histories in the assessment, in addition to DIBC's. (App. 16a). Asserting that it was not responsible for the liabilities of its former trucking subsidiaries,

CenTra challenged that portion of the assessment and the matter was submitted to arbitration as required by 29 U.S.C. § 1401. (App. 10a).

2. After fourteen days of hearings, the Arbitrator selected by the parties from the American Arbitration Association's panel of withdrawal liability specialists issued his 59-page decision. (App. 43a-116a). The Arbitrator ruled that CenTra could not be assessed withdrawal liability for its former trucking subsidiaries.

The core issue, as posed by Central States, was "where the contribution histories [of the trucking subsidiaries] ended up." (App. 65a). Central States argued that the pension "contribution histories" of the Old Subs attached to CenTra in the reorganization. (App. 65a). As the Arbitrator explained, "Central States' case is premised on the theory that, at all times prior to the reorganization, the Old Subs were accruing withdrawal liabilities, and that these accruals never left the CenTra controlled group." (App. 67a).

The Arbitrator rejected these arguments, stating that they are contrary to "the reality that the withdrawal liability obligation under ERISA does not arise until a withdrawal event." (App. 68a-69a). "Before that, there is no liability to be carried either as a liability on the employer's books or as an asset by the Fund." (App. 68a). The Arbitrator emphasized that the governing statute "says as much in its definition of withdrawal liability: 'If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, *then* the employer is liable to the plan in the amount

determined under this part to be the withdrawal liability.'" (App. 69a) (quoting 29 U.S.C. § 1381(a)).

The Arbitrator also relied upon the controlled group rule in 29 U.S.C. § 1301(b)(1), which requires that all businesses under common control be treated as a "single employer" for withdrawal liability purposes. (App. 45a). According to the Arbitrator, CenTra could be assessed withdrawal liability based on the contribution histories of the trucking subsidiaries only if the subsidiaries were "in the CenTra controlled group" at the time they closed. (App. 45a-46a). But they were not; at the time they failed, the trucking subsidiaries were in the U.S. Truck controlled group.

The Arbitrator found that CenTra's sale of those subsidiaries and the subsequent severance of the CenTra and U.S. Truck controlled groups did not run afoul of 29 U.S.C. § 1392. (App. 75a-104a). Under that provision, "[i]f a principal purpose of any transaction is to evade or avoid [withdrawal] liability," liability is assessed "without regard to such transaction." 29 U.S.C. § 1392(c). Based on the extensive evidence presented, the Arbitrator found that the reorganization and stock sales at issue were not transactions that had as their principal purpose to "evade or avoid" withdrawal liability. (App. 76a, 104a).

In short, the Arbitrator held that CenTra was not responsible for the subsequent withdrawal liability of those former trucking subsidiaries. The Arbitrator limited CenTra's withdrawal liability to DIBC's contribution history alone and thus reduced the

withdrawal liability of the CenTra controlled group from $14.7 million to $959,332. (App. 121a).

3. In November 2007, CenTra filed a complaint in federal district court to enforce the Arbitrator's decision. (App. 29a). Central States filed a counterclaim to modify or vacate the Arbitrator's decision. (App. 30a).

In a published opinion, the district court vacated the Arbitrator's decision and reinstated the withdrawal liability assessment that Central States made against CenTra. (App. 29a-42a). The court rejected CenTra's argument that the pre-1996 contribution histories of the trucking subsidiaries properly belonged to U.S. Truck pursuant to 29 U.S.C. § 1398 – and thus held that CenTra could be assessed withdrawal liability for operations that it no longer owned. (App. 41a).

4. The Seventh Circuit affirmed in a published opinion. (App. 1a-28a). The court recognized that there was no dispute about "when" CenTra withdrew from the plan, and the "parties agreed that the 1995 reorganization did not cause a withdrawal." (App. 14a). The court nevertheless found that CenTra was properly assessed withdrawal liability for the pre-stock sales period attributable to the Old Subs.

The court of appeals reasoned that CenTra became the "successor employer" when the Old Subs merged into CenTra in the 1995 corporate reorganization. (App. 21a, 23a, 27a). The court found that, as the successor employer, CenTra inherited the Old Subs' contribution histories. (App. 25a). Disregarding the controlled group rule, the

court found that the "Old Subs' contribution histories remained with CenTra" and "were not inherited by the New Subs" in the 1996 sale-of-business transactions. (App. 25a, 27a). And "U.S. Truck purchased the New Subs, not the Old Subs, which ceased operations prior to the U.S. Truck's purchase." (App. 24a). "Therefore the Old Subs' contribution histories were not inherited by the New Subs but remained with CenTra after the merger." (App. 25a).

Under this reasoning, there were two successor employers – one for the pre-1996 period (CenTra) and one for the post-reorganization period (U.S. Truck). The court then looked to the safe harbor provisions to "determine how to allocate the withdrawal liability . . . among multiple employers." (App. 17a). Citing to a 1992 PBGC opinion letter involving different facts, the court stated that the contribution history of the predecessor should be apportioned among the successors on a "reasonable" basis. (App. 17a).[3]

The court protested that its ruling was not based on an accrual theory. (App. 25a-27a). It said that, under its reasoning, the contribution histories "do not 'accrue' so much as they form the basis for any eventual calculation of the employer's withdrawal

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[3] In Opinion Letter 92-1 dated March 30, 1992, the PBGC addressed a parent company ("P") that had contributed to a Fund in "equal periodic amounts" on behalf of four subsidiaries. P closed one subsidiary and then sold the three remaining subsidiaries to different purchasers, two of whom assumed the contribution obligations of the subsidiary operations and one of whom did not.

liability." (App. 27a). Thus, "if the employer never withdraws, . . . that employer will never be assessed withdrawal liability." (App. 27a). The court did not explain how its decision could be reconciled with 29 U.S.C. § 1301(b)(1) and 29 U.S.C. § 1381(a), the statutory provisions defining employer and withdrawal liability.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision fundamentally misconstrues important provisions of federal pension law. Congress expressly provided that withdrawal liabilities do not exist until an employer actually withdraws from a multiemployer pension plan and that those liabilities are borne jointly by all entities under common control at the time of the withdrawal. 29 U.S.C. §§ 1301(b)(1), 1381(a). The notion that, before any withdrawal event occurred, the contribution histories of the Old Subs attached to CenTra – and CenTra only – is contrary to the architecture of the law. It is not surprising that the Third, Fifth, and Sixth Circuits have interpreted the statute in a manner that conflicts with the Seventh Circuit's ruling here.

The court of appeals protested four times that its ruling was not based upon an accrual theory. Notwithstanding this denial, the Seventh Circuit effectively used an "accrual" theory. It treated the liability as sufficiently alive to attach itself to the parent corporation at the time of the reorganization. If it were merely a history of contributions, it would not have that attribute. Instead, it was treated as an accrued liability, even if one that was not ultimately payable until the time of plan withdrawal. If there

were no accrual of a liability at the time of separation, then it could not be CenTra's liability at all, because the liability is to be determined solely as of the date that withdrawal occurs. 29 U.S.C. § 1381(a).

In this context, the conflict between even two circuits is a compelling one warranting the Court's attention, because the pension fund covers employees in both circuits, as well as a number of other circuits, and is therefore subject to conflicting rulings.[4] Here, Central States covers employees in the Third, Fifth, and Sixth Circuits as well as the Seventh Circuit. Unless the Court resolves the conflict among the circuits, parties to sale-of-business transactions will not be able to make reasonably accurate predictions regarding liabilities that can amount to millions of dollars. The uncertainty the decision creates for a large number of legitimate business transactions and the damage it does to the carefully-balanced structure of MPPAA warrant review by this Court.

I. THE SEVENTH CIRCUIT'S DECISION DISRUPTS THE CAREFULLY-BALANCED STATUTORY SCHEME

In order to check the erosion of the contribution bases of multiemployer plans, ERISA imposes withdrawal liability on an "employer" who withdraws from a multiemployer pension plan. "If an employer withdraws from a multiemployer plan . . . *then* the

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[4] See Charles G. Cole, *Petitioning for Certiorari in the Big Case*, 12 No. 3 Litig. 33 (Spring 1986) (noting that the Court grants certiorari in cases involving a conflict of two circuits when it addresses a labor union operating in both circuits).

employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a) (emphasis added). ERISA defines the term "employer" to mean all business units under common control, not just one member of the group. 29 U.S.C. § 1301(b)(1). Thus, a parent cannot avoid withdrawal liability by assigning the pension plans to particular sub-units under its control.[5]

ERISA recognizes that changes in ownership will occur, and it *allows* employers to withdraw without incurring liability by complying with the safe harbor rules with the new owner assuming the seller's contribution obligations. *See* 29 U.S.C. § 1398. ERISA thus embodies a classic carrot-and-stick approach. If an employer withdraws from a multiemployer pension plan and does not make arrangements for another to assume its contribution obligations, it is subject to withdrawal liability. But if the employer structures the transaction in a way that complies with one of the safe harbor provisions and passes the contribution obligation on to the purchaser, no withdrawal is deemed to occur and no withdrawal liability may be assessed.

At the same time, Congress was concerned that corporate transactions could be abused, leaving other employers in the multiemployer pension plan holding the bag. To deal with these abuses, Congress

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[5] *See* S. Rep. No. 383, 93rd Cong., 2d Sess. 43, *reprinted in* 1974 U.S.C.C.A.N 4890, 4928; *see also* H.R. Rep. No. 807, 93rd Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4716.

included § 1392(c), which provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c).

Here, the court of appeals deprived sections 1398 and 1392(c) of their intended effect. It is undisputed that CenTra's sale-of-business transaction with U.S. Truck complied with the safe harbor provision in 29 U.S.C. § 1398. (App. 14a). And the court of appeals left undisturbed the Arbitrator's finding that a principal purpose of this transaction was not to evade or avoid withdrawal liability. (App. 11a n.5). Yet the Seventh Circuit found that liabilities of the trucking subsidiaries remained with CenTra and never moved with the trucking operations that created the contribution histories to the new owner. (App. 25a).[6]

To accomplish this result, the court of appeals effectively obliterated two other sections of the same statute (29 U.S.C. § 1301(b)(1) and § 1381). The court categorized the contribution histories as separate and apart from the operations of the trucking subsidiaries. The court then took the unprecedented step of assigning the contribution

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[6] The Seventh Circuit did not give effect to § 1398's mandate that the successor employer become the "original employer" for purposes of assessing withdrawal liability because the court found that CenTra's 1995 reorganization separated the subsidiaries' trucking operations from other CenTra assets and operations previously organized within these subsidiaries. (App. 22a-23a).

histories to a particular sub-group within the controlled group. This is contrary to congressional intent that the pension liabilities cannot be assigned to a particular sub-unit within the controlled group and that common control is determined as of the date of withdrawal. *See* 29 U.S.C. §§ 1301(b)(1), 1381(a).

In short, the court of appeals reached a result that completely frustrates the carefully balanced scheme enacted by Congress.

II. THE SEVENTH CIRCUIT'S ANALYSIS CONFLICTS WITH OTHER CIRCUIT COURTS OF APPEALS

The Seventh Circuit created circuit conflicts in its interpretation of ERISA's withdrawal liability provisions. Its analysis conflicts with the Sixth Circuit's holding that a predecessor employer cannot be assessed withdrawal liability for its divested operations where the sale-of-business transaction was not a sham. The Seventh Circuit created a separate conflict with opinions of the Fifth and Third Circuits by disregarding the rule that common control is determined as of the date of withdrawal.

A. The Seventh Circuit's Analysis Conflicts with the Sixth Circuit's Holding on the Liability of Predecessor Employers

The Seventh Circuit's analysis conflicts with the Sixth Circuit's opinion in *Teamsters Pension Trust Fund v. Central Michigan Trucking Line*, 857 F.2d 1107 (6th Cir. 1988). There, the Sixth Circuit affirmed the district court's ruling that, following a bona fide sale of the subsidiary's stock pursuant to a safe harbor provision, "the predecessor employer cannot be assessed withdrawal liability for a subsequent withdrawal or failure of the successor

employer." *Id.* at 1107-08. That court rejected, as antithetical to the governing statute, the pension fund's (the "Fund") theory that the predecessor employer had accrued contingent withdrawal liability prior to the 1980 spin-off. *Id.* at 1111.

Teamsters Pension involved a § 1398 divestiture (stock "spin-off") of a trucking subsidiary. 857 F.2d at 1108. The successor company later failed, and the Fund sought to fasten withdrawal liability on the predecessor employer for the divested operations. *Id.* Specifically, the Fund argued that the predecessor employer was liable as a matter of law for the portion of the subsidiary's "withdrawal liability attributable to the pre-spin-off period" when the predecessor employer and the trucking subsidiary "were under common control." *Id.*

In support of its theory, the Fund made the same substantive arguments adopted by the Seventh Circuit here. The Fund "liken[ed] withdrawal liability to a debt that arises in annual increments and attaches to each business under common control with the contributing business that year." *Teamsters Pension*, 857 F.2d at 1110. The Fund, according to the Sixth Circuit, "would have us conclude that when common control is severed, each business in the group carries with it a contingent liability." *Id.*

The Sixth Circuit found "these contentions to be unpersuasive, and the case authority not to be controlling on the question before us." *Id.* at 1110. To impose liability in these circumstances, according to the court, would require "engaging in legal gymnastics in order to guarantee pension plans at all costs." *Id.* at 1109 (quotations and citation omitted).

"In ERISA/MPPAA, Congress provided a comprehensive set of rules governing pension benefits and employer liability; we should apply the statutory language, not create new rules nor apply additional liabilities." *Id.* at 1111.

The Sixth Circuit explained that the accrual theory proceeds on a flawed definition of "employer." When a parent sells the stock of a subsidiary, "the common control group 'employer' ceases to exist . . . ." *Id.* at 1109. The spin-off company, and any new control group of which it becomes a part, becomes the "original employer" and is solely responsible for any withdrawal by the spin-off company. *Id.* There was no showing that "Congress *intended* a member of a control group employer to remain contingently liable for the withdrawal of a successor employer well after the successful accomplishment of a change in corporate structure pursuant to 29 U.S.C. § 1398." *Id.* at 1111. "Absent a showing of such congressional intent, there is no reason to infer such liability in the absence of express statutory indications." *Id.*; *see also CMSH Co., Inc. v. Carpenters Trust Fund*, 963 F.2d 238, 240 (9th Cir. 1992) ("[A] predecessor employer does not incur liability for the subsequent withdrawal of the successor employer."). [7]

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[7] The district court in *Teamsters Pension* explained that "[a]s the statute now reads there can be only one original employer." *Teamsters Pension Trust Fund v. Central Michigan Trucking Line*, 698 F. Supp. 698, 702 (W.D. Mich. 1987). "[T]he statute leaves no room for a previous 'employer' to step in and make up any withdrawal liability left unpaid by the spin-off company." *Id.* "Terming the spun-off company as the 'original employer' clearly shows that under MPPAA the new employment entity will be deemed the original employer" and

(Continued ...)

Finally, the Sixth Circuit agreed with the district court's "additional conclusion that 29 U.S.C. § 1392(c) was envisioned by Congress as the principal means of preventing an unscrupulous employer from dumping a distressed subsidiary in order to evade or avoid liability under the statutory scheme." *Teamsters Pension*, 857 F.2d at 1109. Under § 1392(c), when a transaction is undertaken for a principal purpose to "evade or avoid" withdrawal liability, the transaction is disregarded and the former employer is treated as the current employer. *See* 29 U.S.C. § 1392(c). As the district court explained, "[t]he existence of section 1392(c) obviates the need for a complex system of contingent withdrawal liability *ad infinitum* proposed by the plaintiffs." *Teamsters Pension*, 698 F. Supp. at 702.

Although the Seventh Circuit denied using an accrual theory, its rationale was substantively the same. It treated the "contribution histories" of the Old Subs as if they have some life independent of the operations to which they pertain. The court's decision accepts an artificial theoretical construct developed by Central States, without statutory support, for assessing liability against the predecessor employer. This resulted in two successor employers for the same employees – CenTra and U.S. Truck.

"any control group to which it belongs at the time of the withdrawal will be responsible for withdrawal liability." *Id.* The Sixth Circuit affirmed the district court "for the reasons set forth fully in the district court's opinion." 857 F.2d at 1109.

The Seventh Circuit's attempt to distinguish *Teamsters Pension* only highlights the opinion's doctrinal conflict with the decision of other circuit courts of appeals. (App. 25a). The Seventh Circuit distinguished *Teamsters Pension* on the ground that the "contribution histories stayed with CenTra instead of transferred to U.S. Truck in the sale of the New Subs' stock." (App. 27a). This reasoning creates a separate conflict with another line of circuit precedent.

B. The Fifth and Third Circuits Hold that Withdrawal Liability Is Determined Solely as of the Date Withdrawal Occurs

The Fifth and Third Circuits hold that withdrawal liability is determined solely as of the date withdrawal occurs. This is often referred to as the "snap-shot" approach to withdrawal liability, under which liability extends only to those in the controlled group as of the date of withdrawl. Both circuits agree with the Sixth Circuit that contribution histories are *not* liabilities and thus become consequential only after the moment of employer withdrawal. The Seventh Circuit's holding cannot be reconciled with the principles articulated in these cases.

In *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306 (5th Cir. 1988), the Fifth Circuit determined that a seller was not liable for a breach of the MPPAA withdrawal liability warranty in a sales agreement because withdrawal liability does not exist until the employer actually withdraws from the plan. "ERISA calculates withdrawal liability according to when the employer withdraws from the pension plan." *Id.* at 310 (citing 29 U.S.C. § 1381(a)).

The issue in *Godchaux* is remarkably similar to the issue presented to the Seventh Circuit in this case.[8] As the Fifth Circuit observed, "Whether Godchaux breached this warranty depends entirely upon when withdrawal liability first existed" for the entity in question. *Id.* at 309-10. "If withdrawal liability exists as soon as a pension plan develops an unfunded vested liability," then a failure to disclose contribution histories would amount to a breach of the warranty to disclose. *Id.* at 310. By the same token, treatment of contribution histories as unfunded vested liabilities in the context of CenTra's case would – as Central States has argued – render them sufficiently alive to attach to a given employer years before any withdrawal occurs.

The Fifth Circuit rejected this analysis outright as contrary to the MPPAA statutory scheme. "ERISA calculated withdrawal liability according to *when the employer withdraws from the pension plan*," and for this reason all assessments of withdrawal liability must be made from the vantage point of the moment of withdrawal. *Id.* at 310. As the Fifth Circuit explained, the contrary argument that withdrawal liability is merely a method of imposing an already determined unfunded, unvested liability is "conceptually faulty and unsupported by the case law." *Id.* at 313. Thus, *Godchaux* rejects

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[8] *Godchaux* featured an employer whose alleged responsibility to pay withdrawal liability stemmed from a business contract as opposed to a contribution agreement. For this reason, the court of appeals was asked to characterize the significance of contribution histories *per se*.

the notion that contribution histories have independent significance.

The Third Circuit has rejected the notion that withdrawal liability can be assessed to a sub-unit of a controlled group. In *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986), the court held that "[t]he language of ERISA indicates that pension funds should be entitled to deal with members of a controlled group as a single entity." *Id.* at 127 (citing 29 U.S.C. § 1301(b)(1)). The Seventh Circuit's approach to assigning withdrawal liability to particular sub-entities within the controlled group contradicts this approach and the requirement of 29 U.S.C. § 1301(b)(1) that all trades and businesses under common control be treated as a single employer.

In a separate decision, the Third Circuit affirmed a decision in which the district court squarely rejected any "accrual liability" theory on facts remarkably similar to those in this case. *Teamsters Pension Trust Fund v. Fed. Express Corp.*, No. Civ. A 86-304, 1995 WL 791371, 1995 U.S. Dist. LEXIS 19980, *aff'd sub nom. Flying Tiger Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 96 F.3d 1432 (3d Cir. 1996). Finding fault with *both* "the fund's definition of the employer" and "the Fund's determination of when withdrawal liability begins," the district court considered the "plain meaning" of the safe harbor provisions to control the assessment of liability in instances where a subsidiary has been spun off to a new controlled group. *Teamsters Pension Trust Fund v. Fed. Express Corp.*, 1995 U.S. Dist. LEXIS 19980 at *23-24. Under the safe harbor provisions and the MPPAA statutory scheme, there

can only be one "original employer" who is "solely responsible for any withdrawal by the spun-off company." *Id.* at 24-25.

Review by this Court is essential to resolve the conflict and to make it clear that a former employer may not be assessed withdrawal liability for divested operations absent statutory support.

III. THE SEVENTH CIRCUIT'S DECISION CREATES CONFUSION AND UNCERTAINTY FOR EMPLOYERS

This is an area in which certainty concerning the rules is critical. In this case, Central States first assessed withdrawal liability against CenTra in 1998, more than two years after the sale of the trucking subsidiaries to U.S. Truck. CenTra's reorganization was undertaken pursuant to favorable opinion letters of the IRS and PBGC. Thousands of companies contribute to multiemployer pension plans, and many of those plans are underfunded. Given the needs for reorganization and reinvestment in some of the most seriously affected heartland industries, uncertainty about this critical sale term is of particular concern.

The large bulk of withdrawal liability disputes involving Central States arise in the Seventh Circuit.[9] Given the frequency in which subsidiaries are spun-off, there can be no question that the Seventh Circuit's ruling affects a large number of

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[9] According to a Westlaw search, as of December 30, 2009, Central States has appeared as a party in a total of 66 circuit court withdrawal liability cases. Of those cases, 43 arose in the Seventh Circuit, 8 arose in the Sixth Circuit, 3 arose in the Third Circuit, and 2 arose in the Fifth Circuit.

closed transactions and will affect an even larger number of future transactions. Employers need to know who inherits the contribution history and therefore who will have responsibility for withdrawal liability without being concerned what circuit may be controlling with respect to the transaction.

While the result favored the pension plan on these facts, the panel's analysis may come back to haunt plan administrators. In other cases, it may be the original controlled group that goes bankrupt. The Seventh Circuit's opinion opens the door to corporate reorganizations that leave liability with the weakening control group rather than the healthy acquirer.

The Seventh Circuit's result-driven approach is particularly inappropriate in the context of this statute, which contains an explicit provision dealing with transactions to evade or avoid liability. *See* 29 U.S.C. § 1392(c). The Arbitrator made specific and detailed findings that this transaction did not have that intent. (App. 75a-104a). The district court and Seventh Circuit never reached the issue. (App. 11a n.5). But the point is, as the Sixth Circuit explained, that this provision provides the proper standard for dealing with transactions where there is a suspicion of avoidance, as opposed to overriding the statutory rules. *See Teamsters Pension*, 857 F.2d at 1109, 1111.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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